It is determined that all or part of the underpayment of tax required to be shown on the returns for the taxable years ended December 31, 1958, December 31, 1959 and December 31, 1960 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted for each year.

It is determined that you had unreported taxable income in the amount of $13,728.01 for the taxable year ended December 31, 1958, $45,642.04 for the taxable year ended December 31, 1959 and $26,614.66 for the taxable year ended December 31, 1960. Your taxable income for each of the aforementioned years is increased accordingly.

[fol. 273] The deduction for purchases claimed in arriving at your cost of goods sold is disallowed to the extent of $9,959.99 for the taxable year ended December 31, 1958, $12,234.31 for the taxable year ended December 31, 1959 and $11,202.20 for the taxable year ended December 31, 1960 because it has not been established that these amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Your taxable income for each of the aforementioned years is increased accordingly.

The deduction claimed for rental expense is disallowed to the extent of $13,518.38 for the taxable year ended December 31, 1959 and $16,086.23 for the taxable year ended December 31, 1960 because it has not been established that the amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Therefore, your taxable income is increased $13,518.38 for the taxable years ended December 31, 1959 and $16,086.23 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Total rental expense claimed	$33,864.38	$37,686.23
Total rental expense allowed	20,346.00	21,600.00
Total disallowed	$13,518.38	$16,086.23

It is determined that the depreciation on an automobile claimed in the total amount of $3,259.52 in your return for the taxable year ended December 31, 1959 and $1,926.00 in your return for the taxable year ended December 31, 1960 is not deductible under any provision of the Internal Revenue Code. Accordingly, your taxable income is increased $3,259.52 for the taxable year ended December 31, 1959 and $1,926.00 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Depreciation on automobile claimed	$3,259.52	$1,926.00
Depreciation on automobile allowed	—0—	—0—
Total disallowed	$3,259.52	$1,926.00

[fol. 274] The deduction claimed for automobile expense* is disallowed in the total amount of $1,036.67 for the taxable year ended Deecember 31, 1959 and $1,493.53 for the taxable year ended December 31, 1960 because it has not been established that the amounts constitute ordinary and necessary business expenses or were expended for the purpose designated. Accordingly, your taxable income is increased $1,036.67 for the taxable year ended December 31, 1959 and $1,493.53 for the taxable year ended December 31, 1960.

	Taxable Years Ended	
	12-31-59	*12-31-60*
Total automobile expense claimed	$1,036.67	$1,493.53
Total automobile expense allowed	—0—	—0—
Total disallowed	$1,036.67	$1,493.53

*Shown as automobile allowances in your return for the taxable year ended December 31, 1960.

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1958

Taxable income as disclosed by return		$25,602.19
Additional income and unallowable deductions:		
(a) Unreported income	$13,728.01	
(b) Purchases	9,959.99	23,688.00
Taxable income adjusted		$49,290.19

EXPLANATION OF ADJUSTMENTS

(a) and (b) These adjustments have been previously explained herein.

[fol. 275] COMPUTATION OF TAX

Taxable year ended December 31, 1958

Taxable income adjusted		$ 49,290.19
Combined normal tax and surtax:		
52% of $49,290.19	$25,630.90	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$ 20,130.90
Correct income tax liability		$ 20,130.90
Income tax liability shown on return, Account No. CI 202227		7,813.14
Deficiency of income tax		$ 12,317.76
Section 6653(b) penalty 50% of $12,317.76		$ 6,158.88

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1959

Taxable income as disclosed by return		$ 24,672.28
Additional income and unallowable deductions:		
(a) Unreported income	$45,642.04	
(b) Purchases	12,234.31	
(c) Rental expense	13,518.38	
(d) Depreciation on automobile	3,259.52	
(e) Automobile expense	1,036.67	75,690.92
Taxable income adjusted		$100,363.20

EXPLANATION OF ADJUSTMENTS

(a), (b), (c), (d) and (e) These adjustments have been previously explained herein.

[fol. 276] COMPUTATION OF TAX

Taxable year ended December 31, 1959

Taxable income adjusted		$100,363.20
Combined normal tax and surtax:		
52% of $100,363.20	$52,188.86	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$ 46,688.86
Correct income tax liability		$ 46,688.86
Income tax liability shown on return, Account No. CI202544		7,401.68
Deficiency of income tax		$ 39,287.18
Section 6653(b) penalty 50% of $39,287.18		$ 19,643.59

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$ 3,736.85
Additional income and unallowable deductions:		
(a) Unreported income	$26,614.66	
(b) Purchases	11,202.20	
(c) Rental expense	16,086.23	
(d) Depreciation on automobile	1,926.00	
(e) Automobile allowances	1,493.53	57,322.62
Total		$61,059.47
Decrease in income:		
(f) Contributions		429.35
Taxable income adjusted		$60,630.12

[fol. 277] EXPLANATION OF ADJUSTMENTS

(a), (b), (c), (d), and (e) These adjustments have been previously explained herein.

(f) Due to the increase in your taxable income as a result of adjustments (a), (b), (c), (d), and (e) you are allowed a deduction for contributions in the amount of $626.03 in lieu of the $196.68 claimed in your return. Accordingly, your taxable income is decreased $429.35.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

Taxable income adjusted		$60,630.12
Combined normal tax and surtax:		
52% of $60,630.12	$31,527.66	
Subtract—22% of $25,000.00	5,500.00	
Total normal tax and surtax		$26,027.66
Correct income tax liability		$26,027.66
Income tax liability shown on return, Account No. CF202624		1,121.06
Deficiency of income tax		$24,906.60
Section 6653(b) penalty 50% of $24,906.60		$12,453.30

[fol. 278] DEFENDANT'S EXHIBIT E

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3614-63

AXIE BLUE, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D-TC) by the Commissioner of Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Axie Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The return for the period here involved was filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties is for the calendar year 1960 in the following amount:

[fol. 279]	*Deficiency*
Income Tax	$5,246.81

4. The determination of the deficiency set forth in said deficiency notice is based upon the following errors:

1960

a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which she did not report on her return for the year 1960.

b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.

c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

a. Petitioner received no dividened distributions which she failed to report on her return.

b. Petitioner received no distributions taxable as long

term capital gains which she failed to report on her return.

c. Expenses deducted for the use of a separate office in the Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

[fol. 280] WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there is no deficiency due from the Petitioner.

/s/ ERNEST R. MORTENSON
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

VERIFICATION

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

AXIE BLUE, being duly sworn, deposes and says:

That she is the Petitioner above-named;

That she has read the foregoing Petition and is familiar with the statements contained therein, and

That the statements contained therein are true, except those stated to be upon information and belief, and that these she believes are true.

/s/ AXIE BLUE
Axie Blue

Subscribed and sworn to before me this 22nd day of July, 1963.

ETHEL B. LEACHMAN
Notary Public in and for said
County and State

[fol. 281] EXHIBIT A

P.O. Box 201—Main Office

Los Angeles 53, California

June 6, 1963

Code 411:90D:TC Phone 688-4183

CERTIFIED MAIL

Received June 10, 1963

Mrs. Axie Blue
817 North Roxbury Drive
Beverly Hills, California

Taxable Year Ended	*Deficiency*
December 31, 1960	$5,246.81

Dear Mrs. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the taxable year ended December 31, 1960 discloses a deficiency in tax in the amount shown above. Assessment of the deficiency has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiency.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanctions provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court

in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner
By R. A. Riddell
District Director

Enclosures:

Statement

[fol. 282] STATEMENT

Code 411:90D:TC

Mrs. Axie Blue
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Year Ended
December 31, 1960

Summary of Deficiency

	Deficiency
Income tax	$5,246.81

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments April 9, 1963 for the taxable year ended December 31, 1960

	Deficiency	*Interest to 4-9-63*
Income tax	$12,569.66	$1,497.17

It has been found necessary in this determination to make adjustment in the assessment made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessment will be

abated to the extent that it exceeds the deficiency set forth herein. The adjustment is as follows:

Year	*Assessment in excess of liability Income tax*
1960	$7,322.85

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

[fol. 283] ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$11,507.87
Additional income and unallowable deductions:		
(a) Income from dividends	$6,571.70	
(b) Capital gains	4,265.01	
(c) Other deductions	600.00	11,436.71
Taxable income adjusted		$22,944.58

EXPLANATION OF AJUSTMENTS

(a) It is determined that you received dividend distributions which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $6,571.70, computed as follows:

Total unreported Dividend distributions	$13,143.40
Your one-half share	6,571.70

(b) It is determined that you received distributions taxable as long-term capital gains from the sale or exchange of property which you failed to report in your return. Accordingly, the taxable income reflected in your separate

return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $4,265.01, computed as follows:

Total long-term capital gain distributions received	$15,077.89
Total long-term capital gains reflected in your return	—0—
Total corrected net-long-term capital gains	$15,077.89
Less: Total net short-term capital loss reflected in your return	2,017.84
Balance	$13,060.05
Your one-half share	$ 6,530.03
Less: Deduction for capital gains (50% of $6,530.03)	3,265.02
Corrected capital gains	$ 3,265.01
Add: Capital loss deducted in return	1,000.00
Increase in taxable income	$ 4,265.01

[fol. 284] (c) The deduction reflected in your separate return in the total amount of $1,200.00 for use of separate office in home which is claimed as an other deduction is disallowed because it has not been established that the amount constitutes an ordinary and necessary business expense or was expended for the purpose designated. Therefore, your taxable income is increased $600.00, the community share deducted in your return.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

	Tax at Ordinary Rates	*Alternative Tax*
Taxable income adjusted	$22,944.58	$22,944.58
Less: Excess of net long-term capital gain over net short-term capital loss		3,265.01
Ordinary taxable income		$19,679.57
Tentative tax	$ 8,937.30	$ 7,090.17
Plus: 50% of $3,265.01	—0—	1,632.50
Total	$ 8,937.30	$ 8,722.67
Less: Dividends received credit (4% of $6,656.70)		266.27
Correct income tax liability—alternative tax (lesser amount)		$ 8,456.40
Income tax liability shown on return, account No. BF 2968		3,209.59
Deficiency of income tax		$ 5,246.81

[fol. 285] DEFENDANT'S EXHIBIT F

IN THE TAX COURT OF THE UNITED STATES

Docket No. 3613-63

BEN BLUE, Petitioner

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

PETITION

The above-named Petitioner hereby petitions for a redetermination of the deficiency set forth in the notice of deficiency (Code 411:90D:TC) by the Commissioner of

Internal Revenue dated June 6, 1963 and as a basis of the proceeding alleges as follows:

1. The Petitioner herein is Ben Blue, c/o Ernest R. Mortenson, 961 East Green Street, Pasadena, California.

2. The returns for the periods here involved were filed with the District Director of Internal Revenue at Los Angeles, California. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the Petitioner on June 6, 1963.

3. The deficiency as determined by the Commissioner for income taxes and penalties is for the calendar year 1960 in the following amount:

[fol. 286]

	Deficiency	*Penalty Sec. 6653(b)*
Income Tax	$5,339.75	$2,669.88

The entire deficiency and all of the penalties are in dispute.

4. The determination of deficiency and penalties set forth in said deficiency notice are based upon the following errors:

1960

a. The Commissioner erred in determining that Petitioner received dividend distributions in the amount of $6,571.70 which he did not report on his return for the year 1960.

b. The Commissioner erred in determining that Petitioner received distributions taxable as long term capital gains in the amount of $4,265.01 for the taxable year 1960.

c. The Commissioner erred in disallowing a deduction in the amount of $600 for the use of a separate office in Petitioner's home.

d. The Commissioner erred in determining that all or part of the deficiency for the taxable year 1960 was due to fraud with the intent to evade tax.

5. The facts upon which Petitioner relies as a basis of this proceeding are as follows:

a. Petitioner received no dividened distributions which he failed to report on his return.

b. Petitioner received no distributions taxable as long term capital gains which he failed to report on his return.

c. Expenses deducted for the use of a separate office in Petitioner's home were ordinary and necessary business expense properly deducted on Petitioner's return.

[fol. 287] d. No part of the deficiency assessed by the Commissioner for the taxable year 1960 is due to fraud on the Petitioner's part with an intent to evade tax.

WHEREFORE, Petitioner prays that this Court may hear the proceeding and determine that there are no deficiencies and penalties due from the Petitioner.

/s/ ERNEST R. MORTENSON
Ernest R. Mortenson
Counsel for Petitioners
961 East Green Street
Pasadena, California

[fol. 288] VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss.

BEN BLUE, being duly sworn, deposes and says:

That he is the Petitioner above-named;

That he has read the foregoing Petition and is familiar with the statements contained therein, and

That the statements contained therein are true, except those stated to be upon information and belief, and that these he believes are true.

/s/ BEN BLUE
Ben Blue

Subscribed and sworn to before me this 17th day of July, 1963.

/s/ Joan D. Hays
Notary Public in and for said
County and State

[fol. 289] EXHIBIT A

SEAL

U. S. TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

District Director

Los Angeles 12, California

June 6, 1963

In reply refer to Code 411:90D:TC 688-4183

CERTIFIED MAIL

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Taxable Year Ended	*Deficiency*	*Code Section 6653(b) Penalty*
December 31, 1960	$5,339.75	$2,669.88

Dear Mr. Blue:

In accordance with the provisions of existing internal revenue laws relating to civil tax liability, notice is given that the determination of your income tax liability for the taxable year ended December 31, 1960 discloses a deficiency in tax and penalty in the amounts shown above. Assessment of the deficiency has been made under the provisions of the internal revenue laws applicable to jeopardy assessments. The attached statement shows the computation of the deficiency.

This notice and any action taken by the Internal Revenue Service in connection with it have no bearing on other sanction provided by law.

If you elect to contest this determination in the Tax Court of the United States, a petition must be filed within ninety days from the date of this letter with that Court in accordance with its rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C.

Very truly yours,

MORTIMER M. CAPLIN
Commissioner

By R. A. Riddell
District Director

Enclosure:

Statement

[fol. 290] STATEMENT

Code 411:90D:TC

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Tax Liability for the Taxable Year Ended

December 31, 1960

Summary of Deficiencies

	Deficiencies	*Penalty Sec. 6653(b)*
Income tax	$5,339.75	$2,669.88

Summary of assessments made under the provisions of internal revenue laws applicable to jeopardy assessments April 9, 1963 for the taxable year ended December 31, 1960

	Deficiency	*Penalty*	*Interest to 4-9-63*
Income tax	$12,726.19	$6,363.10	$1,515.81

[fol. 291] It has been found necessary in this determination to make certain adjustments in the assessments made on April 9, 1963, under the provisions of the internal revenue laws applicable to jeopardy assessments. The assessments will be abated to the extent they exceed the deficiencies set forth herein. The adjustments are summarized as follows:

	Assessment in excess of liability	
Year	*Income tax*	*Penalty*
1960	$7,386.44	$3,693.22

It is determined that all or part of the underpayment of tax required to be shown on the return for the taxable year ended December 31, 1960 is due to fraud. Consequently, the 50 percent addition to the tax provided by section 6653(b) of the Internal Revenue Code is asserted.

A copy of this letter and statement has been mailed to your representative, Mr. Ernest R. Mortenson, 961 East Green Street, Pasadena, California in accordance with the authority contained in the power of attorney executed by you.

ADJUSTMENTS TO INCOME

Taxable year ended December 31, 1960

Taxable income as disclosed by return		$12,107.86
Additional income and unallowable deductions:		
(a) Income from dividends	$6,571.70	
(b) Capital gains	4,265.01	
(c) Other deductions	600.00	11,436.71
Taxable income adjusted		$23,544.57

[fol. 292] EXPLANATION OF ADJUSTMENTS

(a) It is determined that you received dividend distributions which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income

and deductions computed on a community basis, is increased in the amount of $6,571.70, computed as follows:

Total unreported Dividend distributions	$13,143.40
Your one-half share	6,571.70

(b) It is determined that you received distributions taxable as long-term caiptal gains from the sale or exchange of property which you failed to report in your return. Accordingly, the taxable income reflected in your separate return for the taxable year ended December 31, 1960, with income and deductions computed on a community basis, is increased in the amount of $4,265.01, computed as follows:

Total long-term capital gain distributions received	$15,077.89
Total long-term capital gains reflected in your return	—0—
Total corrected net-long-term capital gains	$15,077.89
Less: Total net short-term capital loss reflected in your return	2,017.84
Balance	$13,060.05
Your one-half share	$ 6,530.02
Less: Deduction for capital gains (50% of $6,530.02)	3,265.01
Corrected capital gains	$ 3,265.01
Add: Capital loss deducted in return	1,000.00
Increase in taxable income	$ 4,265.01

[fol. 293] (c) The deduction reflected in your separate return in the total amount of $1,200.00 for use of separate office in home which is claimed as another deduction is disallowed because it has not been established that the amount constitutes an ordinary and necessary business expense or was expended for the purpose designated. Therefore, your taxable income is increased $600.00, the community share deducted in your return.

COMPUTATION OF TAX

Taxable year ended December 31, 1960

	Tax at Ordinary Rates	*Alternative Tax*
Taxable income adjusted	$23,544.57	$23,544.57
Less: Excess of net long-term capital gain over net short-term capital loss		3,265.01
Ordinary taxable income		$20,279.56
Tentative tax	$ 9,291.24	$ 7,416.50
Plus: 50% of $3,265.01	—0—	1,632.50
Total	$ 9,291.24	$ 9,049.00
Less: Dividends received credit (4% of $6,656.70)		266.27
Correct income tax liability— alternative tax (lesser amount)		$ 8,782.73
Income tax liability shown on return, account No. BF 2969		3,442.98
Deficiency of income tax		$ 5,339.75
Section 6653(b) penalty 50% of $5,339.75		$ 2,669.88

[fol. 294]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant,

v.

BEN BLUE, Appellee.

NOTICE OF MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT OF THE UNITED STATES—

Filed May 26, 1965

PLEASE TAKE NOTICE that on July 6, 1965, at 9:30 A.M., or as soon thereafter as counsel may be heard, in

the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the 16th floor of the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, the appellee will move said Court for entry of an order certifying the case to the Supreme Court of the United States.

The ground for said motion will be that the appeal herein from a judgment sustaining a special plea in bar in a criminal case should have been taken directly to the Supreme Court.

Said motion will be based upon this notice, the attached motion, the points and authorities in support thereof [fol. 295] and the records and papers on file herein.

Respectfully submitted,

MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division
/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

[fol. 296]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO CERTIFY THE CAUSE TO THE SUPREME COURT OF THE UNITED STATES—Filed May 26, 1965

The United States moves this Court to certify the above-entitled case to the Supreme Court of the United States, pursuant to the Criminal Appeals Act, as amended (18 U.S.C. 3731), on the ground that the appeal herein from

a judgment sustaining a special plea in bar in a criminal case should have been taken directly to the Supreme Court.

Respectfully submitted,
MANUEL L. REAL
United States Attorney
JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Divsion
/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

* * * * * * *

[fol. 297] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

OPPOSITION TO MOTION TO CERTIFY CAUSE TO THE SUPREME COURT OF THE UNITED STATES—

Filed June 12, 1965

The Appellee, Ben Blue, respectfully opposes the Motion of the United States to certify the above-entitled case to the Supreme Court of the United States pursuant to the Criminal Appeals Act, as amended (18 U.S.C. §3731) on the ground that the appeal herein was an appeal by the United States from a dismissal in the interests of justice and under the provisions of Rule 48(b) of the Federal Rules of Criminal Procedure and was not a judgment sustaining a special plea in bar, and that said dismissal does not come within any of the provisions of the said Criminal Appeals Act so that neither this Honorable Court

or the Supreme Court of the United States has jurisdiction of this appeal.

Dated: 9th day of June, 1965.

Respectfully submitted,

Mortenson & Maxwell
By: Ernest R. Mortenson
Counsel for Appellee

* * * * * * *

[fol. 298]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

MOTION TO DISMISS APPEAL—Dated June 9, 1965

Appellee, Ben Blue, moves the Court to dismiss the appeal herein with costs to appellee on the grounds that:

1. The Notice of Appeal is insufficient and is not effective to give this Court jurisdiction of this appeal.

2. That the subject matter of this appeal is not within the jurisdiction of this Court or that of the Supreme Court of the United States.

Respectfully submitted,

Mortenson & Maxwell
By: Ernest R. Mortenson
Counsel for Appellee

[fol. 299]

QUESTIONS PRESENTED ON MOTION TO DISMISS APPEAL

The questions presented on Motion to Dismiss Appeal are as follows:

1. Where the United States fails to designate the Court to which appeal is taken in a Notice of Appeal from an

adverse decision in a criminal case under the provisions of 18 USC §3731, providing for appeal by the United States in specific instances to the Circuit Court of Appeals and in other specific instances to the Supreme Court of the United States, does the Court of Appeals have jurisdiction of the appeal?

2. Is the dismissal of a tax evasion indictment by the District Court the proper subject of appea' within the terms of 18 USC §3731 where: (a) the Government has determined to institute criminal proceedings against the appellee; (b) then later levies a jeopardy assessment against him; seizes all his property and files liens of record; (c) thus forcing him in defense of his property to file verified factual petitions in the Tax Court; (d) which petitions are considered as an integral part of the Government's criminal case file; (e) whereupon he is subsequently indicted for income tax evasion and; (f) the Government has not made provisions for the release of lien on monies for use in his defense?

• • • • • • •

[fol. 300] STATEMENT OF FACTS

Many of the facts hereinafter related are taken from the facts stated in Appellee's Motion to Dismiss in the Court below, (R. 73) as admitted or qualified in the Opposition to Motion filed by the United States (R. 125) and as further admitted or qualified in Appellee's Reply to Opposition (R. 153). References will be made to pages of the Motion, Opposition and Reply. All transcript references are to transcript of the hearing on the Motion to Dismiss on February 8, 1965.

An August 6, 1964, Ben Blue, Appellee, was indicted for evasion of the income taxes of himself and his wife for the years 1958 and 1959 and of himself for the year 1960 under the provisions of §7201 of the Internal Revenue Code (26 USC §7201) and for knowingly making and subscribing false corporation income tax returns for Merry-Go-Round, Inc., a California corporation, of which he was

the sole stockholder, for the years 1958 to 1960, inclusive. (R. 2)

On November 2, 1962, one and one-half years prior to the indictment, he was advised in writing by Robert K. Lund, Chief of the Intelligence Division of the Internal Revenue Service at Los Angeles, California, to the effect that investigation had been made of the income tax liabilities of the Appellee and Merry-Go-Round, Inc., and [fol. 301] that consideration was being given to the institution of criminal proceedings. Appellee was offered a conference "before final decision is made." (Affidavit in support of Motion to Dismiss, p. 2; letter attached to Opposition to Motion, R. 150 and included as Appendix I hereto.)

At the conference held in November of 1962, Ernest R. Mortenson, attorney for the Appellee, was advised that the District Director would recommend prosecution of Ben Blue on criminal tax charges. A later conference was held with the Regional Office of the Internal Revenue Service at San Francisco, California on March 8, 1963 with similar results. (Affidavit in Support of Motion, p. 3.)

On April 9, 1963, without notice to the Appellee, the United States made a "jeopardy" assessment against the Appellee, his wife, and Merry-Go-Round, Inc. for deficiencies in their income taxes and in the excise tax of Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive, in the total amount of $272,276.63, including taxes, penalties and interest to April 9, 1963. (Motion, p. 2.)

In April 1963, the United States also filed income tax liens of public record in accordance with said assessments and levied upon and seized various bank accounts, accounts receivable and brokerage accounts owned by Appellee, Merry-Go-Round, Inc. and Pantomine Enterprises, Inc., [fol. 302] another wholly owned corporation of Appellee. (Motion, pp. 2-4.)

The record discloses no reason for the assertion of the jeopardy assessment by the Government. The statute of limitations had been extended until June 30, 1964 on the tax liabilities involved. (R. Ex.G; Motion, p. 2.)

The Collection Officer who levied on Appellee's properties and filed the tax liens, testified that he did not investigate to determine the extent of Appellee's assets, but was furnished with this information by Special Agent Charles Freeman, who had recommended criminal prosecution for the Internal Revenue Service. The Collection Officer testified that his action was directed by the Intelligence Division of the Internal Revenue Service. (TR. 79.)

On June 6, 1963, the United States issued statutory notices of deficiencies against Appellee, his wife and Merry-Go-Round, Inc. for the years 1958 to 1960, inclusive for income taxes and penalties in the total amount of $17,521.93, exclusive of interest. Said notices stated that the assessments of April 9, 1963 were erroneous and would be abated to the extent that they exceeded the deficiencies set forth in the notices. Each notice contained the following statement: "If you elect to contest this determination in the Tax Court of the United States, a petition [fol. 303] must be filed within ninety days from the date of this letter with that Court in accordance with its Rules, a copy of which may be obtained by writing to its Clerk, Box 70, Washington 4, D. C." (Motion, p. 4.)

Since Appellee was unable to pay the tax (TR. 149) he filed verified petitions to the Tax Court of the United States which stated the facts upon which Appellee relied in contesting the deficiencies as is required by Rule 7 of the Tax Court Rules of Practice. The petitions were filed on July 29, 1963 and are Exhibits B through F on the Motion to Dismiss. Copies of these petitions were included, considered and used as a part of the criminal case file by the Internal Revenue Service and the Department of Justice and are contained in the United States Attorney's file. (TR. 67-68.)

Robert K. Lund, Chief of the Intelligence Division of the Internal Revenue Service at Los Angeles, California, testified that civil liabilities generally are not assessed until after the criminal phases of a tax case have been disposed of. He could not recall any other case in the last year where a jeopardy assessment had been levied after a criminal investigation was started. (TR. 89.)

Appellee requested the United States to cause funds to be released from those held under the levies so that Appellee might have funds to pay his counsel and other expenses of the criminal litigation, but this was denied. (TR. 97-98.)

[fol. 304] On November 24, 1964, Appellee moved to dismiss the indictment. (R. 73.) The Motion was on the grounds that Appellee could not have a fair trial, that he had been deprived of due process of law, had been denied the right to employ counsel of his choice and had been compelled to testify against himself in violation of the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, by virtue of the fact that the above punitive civil action had been taken against the Appellee forcing him, among other things, to make statements of fact before the Tax Court of the United States in defense of his property after the United States had determined to institute criminal prosecution against Appellee but long before it did so by way of indictment.

On February 8, 1965, after hearing on the Motion, the District Court Judge dismissed the indictment against the Appellee on the following ground:

> "I am much bothered, however, by the fact that the jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has con-[fol. 305] cerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.
>
> "The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one

Government, and all of the agencies work for one United States of America.

"I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the Court should dismiss the Indictment, and I will dismiss it on that ground alone."

In making his decision, the District Court Judge made it clear that there was no question of constitutionality in his decision.

"Mr. Schulman: Is Your Honor discussing the constitutionality in deciding this?

[fol. 306] The Court: No.

Mr. Schulman: You are not saying what rights of the defendant have been violated here.

The Court: Yes, I am.

Mr. Schulman: This is what confuses me.

The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case."

* * * * * * *

[fol. 307] APPENDIX I

Letter to Appellee advising of possible criminal proceedings dated November 1, 1962.

[fol. 308] Intelligence Division

P.O. Box 2151

Los Angeles 53, California

November 1, 1962

Mr. Ben Blue
817 North Roxbury Drive
Beverly Hills, California

Dear Mr. Blue:

The current investigation by the Intelligence Division of your income tax liability for the years 1958 to 1960, inclusive, and of the tax liability of Merry-Go-Round, Inc., for the years 1958 through 1960, is nearing completion. developments of the investigation indicate that a substantial amount of your income and part of the income of Merry-Go-Round, Inc., is not reflected on your Federal income tax returns and the corporation's income tax returns. Consideration is being given to a possible recommendation that criminal proceedings be instituted against you for attempted evasion of your income taxes and the income taxes of Merry-Go-Round, Inc.

In the circumstances, it is deemed appropriate to grant you a formal interview, before final decision is made, at which time you may appear with counsel if you so desire or with any other person who may have knowledge of the facts in your case whom you wish to be present.

Accordingly a formal interview has been set in this matter to be held at 10:00 a.m. on November 13, 1962, in Room 1726, U.S. Post Office and Court House, 312 North Spring Street, Los Angeles, California. Mr. Daniel J. Breslin, Group Supervisor, will conduct the interview. You may at that time present any facts or evidence which you wish to have considered in connection with this matter.

You are requested to inform this office promptly whether you intend to appear for the proposed formal interview. It is important that your reply, and any inquiries relating thereto be addressed to District Director of Internal Revenue, Attention: Chief, Intelligence Division, P.O. Box 2151, Los Angeles 53, California.

Very truly yours,
Robert K. Lund
Chief, Intelligence Division

[fol. 309] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[Title omitted]

NOTICE OF MOTION TO DISMISS APPEAL—Filed June 21, 1965

PLEASE TAKE NOTICE that on July 6, 1965 at 9:30 A.M. or as soon thereafter as counsel may be heard, in the courtroom of the United States Court of Appeals for the Ninth Circuit, located on the 16th floor of the United States Post Office and Courthouse, 312 North Spring Street, Los Angeles, California, the appellant will move said Court for entry of an order dismissing the appeal herein.

The grounds for said motion will be that the Notice of Appeal is insufficient and is not effective to give this Court jurisdiction of this appeal and the subject matter of this appeal is not within the jurisdiction of this Court or that of the Supreme Court of the United States.

[fol. 310] Said motion will be based upon this notice, the Motion to Dismiss Appeal heretofore filed, together with attachments thereto and the records and papers on file herein.

Respectfully submitted,

Mortenson & Maxwell
By: Clyde R. Maxwell
Counsel for Appellee

Dated: 18th day of June, 1965

[fol. 310a] Affidavit of service by mail [omitted in printing]

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[fol. 312]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

OPPOSITION TO APPELLEE'S MOTION TO DISMISS APPEAL—
Filed July 3, 1965

Appellant, United States of America, opposes appellee's Motion to Dismiss the Appeal herein for the following reasons:

1. The Notice of Appeal was sufficient to give this Court jurisdiction of this appeal.

2. The appeal herein although originally docketed in this Court, should have been taken directly to the Supreme Court of the United States, as an appeal from a judgment sustaining a special plea in bar in a criminal case; and appellant accordingly has properly moved this Court to certify the above-entitled case to the Supreme Court, pursuant to the Criminal Appeals Act, as amended, Title 18, United States Code, Section 3731.

Respectfully submitted,

MANUEL L. REAL
United States Attorney

[fol. 313]

JOHN K. VAN DE KAMP
Assistant United States Attorney
Chief, Criminal Division

/s/ J. BRIN SCHULMAN
J. Brin Schulman
Assistant United States Attorney
Assistant Chief, Criminal Division
Attorneys for Appellant
United States of America

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[fol. 314]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,007

Appeal from the United States District Court for the Southern District of California, Central Division.

UNITED STATES OF AMERICA, Appellant,

vs.

BEN BLUE, Appellee.

Before: Jertberg, Circuit Judge, Madden, Judge Court of Claims, and Duniway, Circuit Judge.

OPINION—August 16, 1965

DUNIWAY, *Circuit Judge:*

The United States moves that we certify this appeal to the Supreme Court of the United States, pursuant to the provisions of the Criminal Appeals Act, as amended, 18 U.S.C. §3731. The appellee, Ben Blue, opposes the motion and moves that we dismiss the appeal. We deny Blue's motion and grant the government's motion.

1. *The factual background.*

On August 5, 1964 Blue was indicted on 6 counts. The first 3 counts charge the filing of false and fraudulent income tax returns for the calendar years 1958, 1959 and 1960 (26 U.S.C. §7201). The other 3 counts charge the filing of false income tax returns on behalf of a corporation, Merry-Go-Round, Inc., for the same three calendar years. (26 U.S.C. §7206(1)). On November 24, 1964 Blue filed

a motion to dismiss the indictment. The grounds are: In the course of an investigation of the income tax returns [fol. 315] of Blue and of the corporation for the years in question, and as early as November 13, 1962, Blue and his counsel were advised that the Internal Revenue Service proposed to recommend criminal prosecution of Blue in connection with the tax returns for the years in question. On April 12, 1963 the Service levied a jeopardy assessment against Blue and served him with a so-called 90-day letter, stating the assessment, the claimed deficiencies, and his right to petition the Tax Court for relief. Levies were made on all of his known assets, but these did not produce enough funds to pay the assessments. Within the 90 days, and on July 29, 1963, Blue did file petitions for relief with the Tax Court. These petitions were transmitted to the Enforcement Division of the Internal Revenue Service on October 17, 1963 and from there found their way to the Department of Justice and ultimately into the files of the Assistant United States Attorney handling the prosecution.

2. *The trial court's ruling.*

Blue's motion to dismiss the indictment was based upon two principal contentions: (1) that the levying of the jeopardy assessment deprived him of access to all of his assets and thereby prevented him from being adequately represented by counsel and from procuring the services of an accountant in the defense of the criminal charge, and (2) that by tying up all of his assets, the government prevented him from paying the taxes assessed and suing for a refund and, in effect, compelled him to file petitions with the Tax Court in which, in order to present his case to the Tax Court, he was forced to disclose information in violation of his privilege, under the Fifth Amendment to the Constitution, against incriminating himself. The motion is supported by an affidavit of his counsel, and at the hearing various witnesses testified.

At the conclusion of the hearing the court granted the motion but wrote no opinion, the only order in the record being a minute order which reads in pertinent part: " . . .

indictment dismissed; defendant discharged; bond exonerated." It found against Blue's first contention, but sustained his second contention.[1]

[fol. 316]

3. *The sufficiency of the notice of appeal.*

One ground upon which Blue asks us to dismiss the government's appeal is that the notice of appeal does not state [fol. 317] the name of any court to which the appeal is taken. The notice does, however, contain all of the material that is required by Rule 37 of the Federal Rules of Criminal Procedure. On the other hand, it does not conform to Rule 10 of the Rules of the Supreme Court, which relate to appeals to that Court. Apparently, counsel who prepared the notice read Rule 37, but did not look at the accompanying Form 26, which contains a recital that the appellant appeals "to the United States Court of Appeals for the ..... Circuit." In fact, on the day the notice of appeal was filed, the Clerk of the District Court forwarded a copy of the notice of appeal and a statement of the docket en-

[1] At the conclusion of the hearing, the court first stated that it could not sustain the first contention, because Blue had earnings and earning capacity and so was able to employ counsel and other assistants. It then made the following remarks, among others:

"I am much bothered, however, by the fact that the Jeopardy assessment was filed after the Internal Revenue Bureau had decided that it was going to proceed criminally, and was proceeding to investigate him criminally, and levied the jeopardy assessment, and that under the law he is compelled to come forward with whatever proof he has and whatever facts he has concerning the same years and concerning whether or not there was fraud or whether it was wilful in the Tax Court, whether or not that isn't a violation of his right to not be compelled to be a witness against himself.

"The testimony here is that they correlate between the Internal Revenue Bureau and the Department of Justice, and, indeed, it hardly seems necessary that there be any testimony to that effect because it is one Government, and all of the agencies work for one United States of America.

"I read the Boyd case, and I am satisfied that under the Boyd case and under the Heath case in the Ninth Circuit that under the circumstances peculiar to this case, and because the defendant has been compelled and will be compelled to come forward on the same matters as are concerned in this criminal case, to testify against himself, that the court should dismiss the Indictment, and I will dismiss it on that ground alone.

"Mr. Schulman [government counsel]: May I ask your Honor just one thing in that regard? If the Government were at this time to advise this court that it has no intention to, nor will it in any way, offer that petition in the Tax Court or any statement attached to it in evidence against the defendant—and I do so make such a representation to this court at this time, that the'

tries to the Clerk of this court, as is required by Rule 37 (a)(1), and mailed a copy to counsel for Blue, as is also provided in the rule. We think that the failure of the notice to name the court to which the appeal is taken is immaterial, since the appeal normally will come to this court, as the rule itself indicates, and the regular procedure was in fact followed. Our view is strengthened by the fact that the Criminal Appeals Act provides for a transfer of an [fol. 318] appeal to the proper court if the appellant should appeal to the wrong court. This, rather than dismissal, is the remedy calculated to assure a just disposition of the case. This is precisely the sort of technical objection that the Rules were designed to eliminate. (Rule 2.) We therefore hold that this ground for dismissal is without merit.

4. *The motion that we certify the appeal to the Supreme Court.*

The Criminal Appeals Act lists three sets of circumstances under which an appeal may be taken by the United

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Government will not seek to do so—I strenuously do not think that there would be any prejudice to the defendant.
"The Court: I do not think that that would change the legal effect of compelling him to come forward in the Tax Court and disclose his tax or have a default taken against him for the taxes and for the fraud penalty. I do not think it would cure that. I think that when the Government set in motion the jeopardy assessment and the 90-Day Letter which compelled him to come forward within a certain time and file his petition in the Tax Court, and then when they did that they foreclosed themselves from proceeding in the criminal case during that time.
"Mr. Schulman: Even though nothing which may have been filed by the defendant, and even though he did not raise a question of self-incrimination at that time, and even though the trial has not yet occurred and we don't know if that evidence would be offered or the Government has now said that it is telling the court it would not offer such evidence, and without the admissibility of evidence question your Honor still feels that defendant has been deprived of certain rights?
"The Court: I think so, counsel . . . I have held that they have not made a sufficient showing as a matter of fact that he is deprived of his right to employ counsel."

* * * * * * *

"Mr. Schulman: Very well. In essence—and I certainly don't want to detract from any of the language that your Honor more artfully put in stating your ruling—but in substance then hasn't your Honor said that the making of a jeopardy assessment subsequent to a time when a criminal investigation is under way in and of itself——
"The Court: And followed by an Indictment.

States direct to the Supreme Court. The third and the only one which could be applicable here reads as follows:

> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The government contends that what the court did here was, in essence, to sustain a motion in bar. It is conceded that Blue has not yet been put in jeopardy.

[fol. 319] In the first case construing the statute, *United States* v. *Celestine*, 1909, 215 U.S. 278, the Court held, without elaboration, that the sustaining of a plea which challenged the jurisdiction of the Federal Court over an Indian, was the sustaining of a special plea in bar. This was followed by *United States* v. *Barber*, 1911, 219 U.S. 72. In that case the trial court sustained what was denominated a plea in abatement, the basis of which was that the prose-

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"Mr. Schulman:——and followed by an Indictment.——
"The Court: Yes.
"Mr. Schulman: ——then if there is a jeopardy assessment then in essence your Honor has held that the Government could not indict without violating the rights of the defendant.
"The Court: That is right."
* * * * * * *

"Mr. Schulman: Is your Honor discussing the constitutionality in deciding this?
"The Court: No.
"Mr. Schulman: You are not saying what rights of the defendant have been violated here."
* * * * * * *

"Mr. Schulman: This is what confuses me.
"The Court: Yes, I have. They have compelled him to come forward and assert in a petition where he is the aggressor, he is the petitioner, and establish facts concerning the very things that are concerned in this Indictment in order to prevent a civil judgment from being taken against him, just as in the Boyd case.
"Mr. Schulman: Your Honor did not consider, I assume, the fact that he might have paid the tax rather than file a petition?
"Mr. Mortenson [Counsel for Blue]: With what?
"Mr. Schulman: That might well have been a point, your Honor. We have no evidence that he could not have paid the tax instead of filing that petition.
"Mr. Maxwell [Co-counsel for Blue]: They have levied on all his assets, your Honor. That wasn't enough to pay the tax.
"The Court: I think the inference can be made from the levying on all of his assets and the fact that there was not sufficient return from the levy to pay the tax, that the inference can be drawn that he did not have sufficient money to pay the tax, and I will draw that inference."

cution was barred by the statute of limitations when the indictment was found. The Court held that the substance of the action of the Court, and not the label that attached to it, should determine whether the Court's action was the sustaining of a plea in bar. It then laid down the following rule:

> "As said by counsel for the Government, 'the plea of the statute of limitation does not question the validity of the indictment, but is directed to the merits of the case; and if found in favor of the defendant the judgment is necessarily an acquittal of the defendant of the charge, and not a mere abatement of the action; and it has been universally classed, in both civil and criminal procedure, as a plea in bar and not one in abatement.' " (p. 78.)

This decision was followed in *United States* v. *Oppenheimer*, 1916, 242 U.S. 85 and in *United States* v. *Goldman*, 1928, 277 U.S. 229.

In *United States* v *Thompson*, 1920, 251 U.S. 407, the trial court quashed an indictment on the ground that when a prior Grand Jury had had the case presented to it and refused to indict, the United States Attorney could not then take the matter again to a second Grand Jury and obtain an indictment. The Court held that this amounted to the sustaining of a plea in bar "because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment, but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based." (p. 412.)

In *United States* v. *Storrs*, 1926, 272 U.S. 652, the defendants, indicted for a conspiracy to use the mails to defraud, pleaded in abatement certain irregularities in the proceedings of the Grand Jury, and the Court dismissed [fol. 320] the indictment. The irregularities had nothing to do with the merits—with the right of the government to prosecute. They could readily be avoided in obtaining a new indictment. At the time of the dismissal the statute

of limitations had run. The Court held that the fact that the statue of limitations had run after the indictment was found did not convert the plea in abatement into a plea in bar, and that the plea in abatement did not amount to a plea in bar because it did not look to barring the action, but only to abating it. In the course of his opinion, Mr. Justice Holmes used the following language: "The statute uses technical words, 'a special plea in bar,' and we see no reason for not taking them in their technical sense." *United States* v. *Thompson, supra* was distinguished and was said to go "to the extreme point."

The next decision is *United States* v. *Murdock*, 1931, 284 U.S. 141. Murdock was indicted for refusing to answer questions put to him by an Internal Revenue Agent acting under a summons that had been served upon Murdock. He entered a plea to the indictment, the basis for which was that if he had answered the questions he would have been compelled to become a witness against himself in violation of the Fifth Amendment. The Court sustained the plea and discharged him. The Court said that the effect of the order was "to bar further prosecution for the offense charged," (p. 147) and that consequently, it amounted to a plea in bar. It cited all of the foregoing cases except *Celestine*. In *United States* v. *Hark*, 1944, 320 U.S. 531, Hark was indicted for violating a maximum price regulation issued under the Emergency Price Control Act of 1942 (56 Stat. 23). The Court granted a motion to quash on the ground that, because the regulation had been repealed subsequent to the offense charged, the defendant could not be prosecuted. This was held to be a bar to the prosecution, and therefore, in substance, a plea in bar, citing *Thompson*, *Barber* and *Oppenheimer*, *supra*.

United States v. *Hoffman*, 1948, 335 U.S. 77, involved criminal contempt proceedings against Hoffman based upon a charge that he had violated an injunction prohibiting him from selling used cars at over ceiling prices, in violation of the Emergency Price Control Act. A rule to show cause was dismissed on his motion on the ground that he was entitled to immunity under Section

202(g) of the Act. The jurisdiction of the Supreme Court [fol. 321] was sustained under the Criminal Appeals Act, but no party seems to have contended that the order of the Court did not amount to the sustaining of a plea in bar, the only question being whether the United States, as distinguished from the Administrator of the Office of Price Administration, was the plaintiff in the injunction case, and so could appeal.

Finally, there is the decision in *United States* v. *Mersky*, 1960, 361 U.S. 431. In that case, one of the questions involved was the construction of certain regulations issued by the Secretary of the Treasury under 19 U.S.C. §1304. A majority of the Court held that a dismissal of the information, based upon the determination of the court below that the acts charged did not violate the regulation, was a decision dismissing the information based upon the invalidity or construction of the statute upon which the indictment or information is founded, this being another ground for direct appeal to the Supreme Court under Section 3731 of Title 18. The majority therefore expressly declined to reach the question whether the action of the trial court also amounted to the sustaining of a motion in bar. Mr. Justice Brennan, with whom Mr. Justice Whittaker agreed, was of the opinion that the Court had sustained a plea in bar because the judgment was one "which will end the cause and exculpate the defendant." He relied upon *Hark, Murdock and Storrs, supra.* Mr. Justice Frankfurter and Mr. Justice Stewart, with whom Mr. Justice Harlan concurred, were of the opinion that the Court's decision did not amount to a sustaining of a plea in bar. Mr. Justice Frankfurter relied upon the *Storrs* case, *supra*, feeling that *Hark, supra*, was wrongly decided. Mr. Justice Stewart was of the same opinion, and at page 457 of his dissent, he states the technical history of the concept of a special plea in bar as one which sets up affirmative defenses which would bar the prosecution and he points out that each of the decisions that we have cited above involves action of this character.

This court, in *United States* v. *Apex Distributing Company*, 9 Cir., 1959, 270 F.2d 747, held that the mere fact

that an order purports to dismiss a criminal proceeding "with prejudice' does not make it the sustaining of a plea in bar, and that the dismissal of an indictment for failure by the government to obey a pretrial order for the produc-
[fol. 322] tion of documents was not the sustaining of a plea in bar. The ground for dismissal in Apex could have been cured by compliance with the pretrial order. Thus the plea was clearly not a plea in bar within the meaning of the statute. In accord is *United States* v. *Heath*, 9 Cir., 1958, 260 F2d. 623 at 629, *ff*. There we laid down the rule that "a motion in bar destroys the right of action and bars prosecution." The motion there was similar to that in *Apex*. The government had lost certain papers of the defendant, necessary to his defense. If the government should find them, it could then proceed. Thus the granting of the motion did not destroy the right of action or bar the prosecution.

At first blush, *United States* v. *Brodson*, 7 Cir., 1956, 234 F.2d 97 seems squarely in point. There the trial court sustained a motion almost identical to the one here. However, the self-incrimination question was not raised. The court granted the motion on the ground that the jeopardy assessment prevented the defendant from preparing his defense, by depriving him of funds with which to do so. This ground could have been avoided by the government by cancelling the assessment, or by releasing sufficient funds to enable the defendant to defend himself. The Court of Appeals held that this was merely an abatement of the action, not the sustaining of a plea in bar and declined to certify the appeal to the Supreme Court. It cited *Goldman* and *Murdock*, *supra*, and it specifically distinguished *Murdock* as being a decision involving a dismissal based on the constitutional guarantee against self-incrimination. We do not think that *Brodson* is in point. Here, the trial court specifically rejected the ground upon which the trial court in *Brodson* granted the motion. Here, the court's order was specifically based (see *footnote 1*, *supra*) on a violation of the Fifth Amendment privilege against self-incrimination.

It is arguable that in this case what the court did was to sustain a plea in abatement because the ground for the motion "has nothing to do with the merits of the criminal action" (*Apex, supra*, 270 F.2d 750), but rather arises from an event occurring independently of the finding of the indictment, namely, the filing of the petitions with the Tax Court under compulsion of the jeopardy assessments. On the other hand, the basic facts upon which the order is grounded—the levying of the assessment, and the filing of the petitions in the Tax Court, under the compulsion [fol. 323] of the assessment—occurred before the indictment was found. Thus, if the theory on which the motion was granted is sound, the indictment was subject to the fatal weakness with which the trial court thought it was infected at the time when the case was in the womb of the Grand Jury, and it carried the taint when it was born. There is no way, as there was in *Apex,* or *Heath* or *Brodson* or *Storrs,* in which it could be cured. Does not the order, then amount to a sustaining of a plea in bar? Does it not "bar the absolute right of the United States to prosecute" *(Thompson, supra)* or "bar further prosecution of the offense charged" *(Murdock, supra)?* We think that it does, and that the motion to certify the appeal to the Supreme Court should be granted. If the trial court's views are correct, there is no possible way in which the defect in the indictment can be cured, in this case or in any other indictment that may be found. The decision thus amounts to an acquittal of Blue. It makes no difference whether the decision was correct. That is what the appeal is about.

Under the Criminal Appeals Act, an appeal does not lie to this court in a case "where a direct appeal to the Supreme Court of the United States is provided by this section." (18 U.S.C. §3731.) We need not, therefore, consider whether, if not appealable to the Supreme Court, the decision could be appealed to this court.

The motion to dismiss the appeal is denied. The motion to certify the appeal to the Supreme Court is granted.

[fol. 324] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

ORDER denying petition for rehearing and petition for rehearing en banc—September 15, 1965.

Before: Jertberg, Circuit Judge, Madden, Judge, Court of Claims, and Duniway, Circuit Judge.

Appellees petition for rehearing is denied. Appellee's petition for rehearing en banc is denied.

GILBERT H. JERTBERG
United States Circuit Judge

/s/ J. WARREN MADDEN
J. Warren Madden
Judge, Court of Claims

BEN C. DUNIWAY
United States Circuit Judge

[fol. 325]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20007

[Title omitted]

Certificate of Clerk, United States Court of Appeals for the Ninth Circuit, to record certified to the Supreme Court of the United States.

I, FRANK H. SCHMID, as Clerk of the United States Court of Appeals for the Ninth Circuit, do hereby certify the foregoing transcript of record in three volumes to be the full, true and entire record, excluding original exhibits,

filed in my office in the above cause, together with the proceedings had in this Court, made pursuant to the order of the said United States Court of Appeals for the Ninth Circuit, and certified under the Criminal Appeals Act, 18 U.S.C. Sec. 3731.

ATTEST my hand and the seal of the said United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 30th day of August, 1965.

/s/ Frank H. Schmid
Frank H. Schmid, Clerk

[fol. 326]

Supreme Court of the United States

No. 531, October Term, 1965

United States, Appellant,

vs.

Ben Blue

Order Postponing Jurisdiction—January 17, 1966

APPEAL from the United States District Court for the Southern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction in this case is postponed to the hearing of the case on the merits and is placed on the summary calendar.

January 17, 1966